2020 SPORTS INJURY: RECKLESS OR INTENTIONAL MISCONDUCT

A participant in a (recreational) (amateur) (professional) athletic activity that includes physical contact is liable for injury caused to another participant during the activity if the participant who caused the injury acted recklessly or with intent to cause injury.

[A participant acts with intent to cause injury if (he) (she) engages in conduct with the intent to cause injury by that conduct. An intent to cause injury exists where the participant either means to cause injury by (his) (her) conduct or where an injury is almost certain to follow from this conduct.]

[A participant acts recklessly if (his) (her) conduct is in reckless disregard of the safety of another. It occurs where a participant engages in conduct under circumstances in which (he) (she) knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another and (he) (she) proceeds in conscious disregard of or indifference to that risk. Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.]

In considering the conduct involved in this case, you should consider the sport involved; the rules, regulations, customs and practices governing the sport, including the types of contact and the level of violence generally accepted; the risks inherent in the game and those that are outside the realm of anticipation; and the protective equipment worn.

You should also consider the age and physical attributes of the participants and their respective skills and knowledge of the rules and customs of the game.

[If you find that (defendant) engaged in conduct and intended to cause injury by that conduct, however great or small, or that (defendant)'s conduct was almost certain to cause injury in some way, however great or small, then (defendant) acted with intent to injure.]

[If you find that (defendant) engaged in conduct which (he) (she) knew or a reasonable person under the same circumstance would know created a high risk of physical harm to another, and (he) (she) proceeded anyway, then (defendant) acted recklessly.]

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 2006 and 2018. This revision was approved by the Committee in October 2022; it added to the comment.

The instruction is based on Wis. Stat. § 895.525(4m) which codified the theory espoused by the dissent in Lestina v. West Bend Mut. Ins. Co., 176 Wis.2d 901, 501 N.W.2d 28 (1993). The statute reads:

> **(4m)** LIABILITY OF CONTACT SPORTS PARTICIPANTS. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.
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> (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

The Wisconsin Supreme Court has cited the language of paragraph 3 of this section with approval. See Noffke v. Bakke, 315 Wis. 2d 350, ¶ 36 (2009).

Paragraph four is taken from the majority opinion in Lestina. Although these considerations were intended to aid the fact-finder in defining actionable ordinary negligence in a sports injury context, the Committee thought they would be helpful in either intentional or reckless sports injury cases, as well.

For a case involving a sports-related injury, see Shain v. Racine Raiders Football Club, Inc., 2006 WI App 257, 297 Wis.2d 869, 726 N.W.2d 346.

Exculpatory releases. "It is well-settled that an exculpatory clause ... cannot, under any circumstances ... preclude claims based on reckless or intentional conduct." See Brooten v. Hickok Rehab. Servs., LLC, 2013 WI App 71, ¶10, 348 Wis. 2d 251, 831 N.W.2d 445. See also Werdehoff v. General Star Indemnity Co., 229 Wis. 2d 489, 600 N.W.2d 214 (Ct. App. 1999), and Schabelski v. Nova Casualty Company, 2022 WI App 41, 404 Wis.2d 217, 978 N.W.2d 530.